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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FRANK BROOKS, Defendant and Appellant.	B169384 (Los Angeles County Super. Ct. No. TA066303)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven C. Suzukawa, Judge. Affirmed in part; remanded for resentencing.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Frank Brooks was convicted of four counts of lewd conduct with a child under the age of 14 years (Pen. Code,[1] § 288, subd. (a)) and one count of oral copulation with a child under the age of 14 years and more than 10 years younger than the perpetrator (§ 288a, subd. (c)(1)). He argues on appeal that the trial court: (1) failed to inquire into the qualifications of a police detective to give expert testimony; (2) should have given a limiting instruction similar to CALJIC No. 10.64; (3) should have submitted the question of his eligibility for probation to the jury; (4) made several sentencing errors, requiring a remand for resentencing; and (5) imposed a sentence that constitutes cruel and unusual punishment under the state and federal constitutions. We remand for resentencing but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, 72-year-old Frank Brooks performed a variety of sexual acts with his godsons, Y.P. and D.P. At the time, Y.P. was 10 years old and D.P. was six or seven. After the boys reported Brooks's conduct, police arrested and interviewed Brooks. Brooks admitted to a number of sexual offenses in an audiotaped interrogation. He claimed that the boys had interrupted him as he watched a pornographic film and that Y.P. wanted to know what it felt like to receive oral sex, so Brooks "tr[ied] to please him" by performing oral sex on him. Brooks also stated that he "show[ed]" Y.P. how to ejaculate by masturbating himself until he did so. Brooks admitted to placing his penis between Y.P.'s legs from behind and rubbing it against Y.P.'s testicles. He claimed that he had been shocked but that Y.P. wanted it. Brooks admitted to a second incident in which he masturbated and ejaculated while he and the boys watched a pornographic movie.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Upon being questioned about contact with D.P., Brooks said that D.P. was inquisitive and also wanted to know both how it felt to have his penis sucked and how it felt to have what Brooks did to Y.P. done to him, but that Brooks felt that D.P. was too young. Ultimately, Brooks claimed, D.P. put his penis in Brooks's mouth and urinated, and then attempted to mount Brooks from behind as Brooks had done to Y.P.

Brooks was convicted of four counts of lewd conduct upon a child under the age of 14 years (§ 288, subd. (a)); three of the counts pertained to Y.P., the other to D.P. Brooks was also found guilty of orally copulating D.P., a person under the age of 14 years and more than 10 years younger than Brooks (§ 288a, subd. (c)(1)). The jury also found that Brooks committed lewd acts against more than one victim. The court sentenced Brooks to two consecutive terms of 15 years to life in state prison, with an additional concurrent sentence of 15 years of life. Brooks appeals.

DISCUSSION

I. Rebuttal Testimony Concerning Detective's Experience

Detective Richard Ruiz was the child abuse investigator who interviewed Y.P. and D.P. In very brief rebuttal testimony, the trial court permitted him to testify that in his experience interviewing hundreds of children, he had observed that it was common for children to be less forthcoming in their initial descriptions of abuse but to give more detailed accounts in later interviews. Brooks contends that the trial court erred in permitting this testimony because there was no inquiry into the detective's qualifications to testify as an expert and because the trial court did not sua sponte instruct the jury with an instruction such as CALJIC No. 10.64 concerning the limited uses of expert testimony.

Contrary to Brooks's assertion, there was no failure to establish a foundation for the detective's opinion testimony. The basis for the detective's testimony was his experience interviewing children as a child abuse investigator for the Los Angeles

County Sheriff's Department. On direct examination, he testified that his job was to investigate allegations of physical and sexual abuse of children under the age of 18 years, and that in the course of performing that job he had interviewed hundreds of children. The sole basis for his opinion testimony that children tend to provide more detail over time when they described abuse was this interviewing experience. While the expertise of a witness whose qualification to testify as an expert is challenged must be shown before the witness may testify as an expert (Evid. Code, § 720, subd. (a)), here the detective's ability to testify as an expert on this specific subject—what he perceived to be a common tendency of children in discussing abuse allegations over time—had been established by his testimony concerning his work and the number of children he had interviewed. "A witness' special knowledge, skill, experience, or training may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 720, subd. (b).)

Brooks's second claim, that an instruction like CALJIC No. 10.64 should have been given concerning this evidence, is based on his conflation of the detective's testimony with evidence of psychological syndromes such as rape trauma syndrome and child abuse sexual accommodation syndrome. In testimony about these syndromes, the jury is instructed that it may not consider evidence about the syndrome as proof that the accuser's allegations are true; that the research supporting the syndrome is based on the assumption that a sexual offense has occurred; and that the evidence is admissible only for the purpose of showing that the victim's response is not inconsistent with having been raped or molested. (CALJIC No. 10.64.) No such admonitions were necessary here. Unlike the evidence of the syndromes that necessitates use of CALJIC No. 10.64, the detective's limited rebuttal testimony was based not on secondary sources or research studies but on his personal observations. The detective's testimony did not pertain to whether the abuse allegations were true or whether the boys were molested; he simply described what he observed as a common tendency among children to provide more information in later accounts as they become more comfortable. He based his opinion entirely on his experience and neither purported to describe research nor demonstrated

methodological assumptions that a crime was committed such that the advisories of CALJIC No. 10.64 would be warranted. All of these factors distinguish the present situation from the case on which Brooks relies, *People v. Housley* (1992) 6 Cal.App.4th 947, 954-959, in which a psychologist who had never interviewed the victim testified about the psychological reasons that abuse victims falsely recant and a limiting instruction was ruled necessary. As this testimony is not akin to the rape trauma or child abuse syndrome testimony that requires a sua sponte limiting instruction, the trial court would only have been obligated to give a limiting instruction if Brooks had requested one. (Evid. Code, § 355; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.)

II. *Apprendi* Issues

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the Supreme Court held that a defendant has a federal constitutional right to have a jury determine, beyond a reasonable doubt, any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum. The question presented here is whether that holding, or the court's ruling in *Blakely v. Washington* (2004) 524 U.S. ___, 124 S.Ct. 2531 (*Blakely*), requires a jury to determine whether a defendant convicted of a violation of section 288, subdivision (a) is eligible for probation when the defendant is alleged to come within the provisions of the one strike law (§ 667.61.) We find that a jury determination of probation eligibility is not required by either *Blakely* or *Apprendi*.

Brooks was sentenced pursuant to section 667.61, subdivision (b), which provides that "a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life . . . ." Section 667.61, subdivision (c)(7) states that the section applies to "[a] violation of subdivision (a) of Section 288, unless the defendant qualifies for

probation under subdivision (c) of Section 1203.066." Subdivision (e)(5) of section 667.61 applies to offenses where the defendant "has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

At trial, the jury was instructed that it was required to find whether the section 667.61 allegation of multiple victims applied to Brooks, and in order to prove the allegation, the People had the burden of proving, beyond a reasonable doubt, that Brooks committed a violation of section 288, subdivision (a) against more than one victim. In returning its verdicts, the jury specifically found that Brooks had violated section 288, subdivision (a) and that the violations were committed against more than one victim.

Brooks argues that the trial court erred in failing to instruct the jury regarding probation eligibility pursuant to section 1203.066, subdivision (c). He claims that pursuant to *Apprendi* and *Blakely*, the trial court was required to submit the issue of probation eligibility to the jury because the one strike law only applies to a person convicted of a violation of section 288, subdivision (a) when that person is not eligible for probation under section 1203.066, subdivision (c). (§ 667.61, subd. (c)(7).) Brooks characterizes these probation eligibility factors as elements of the one strike law and claims that because the jury was not instructed to make specific findings that he was not eligible for probation pursuant to 1203.066, the court failed to instruct the jury on substantially all the elements of one strike sentencing.

Brooks's argument fails under *Apprendi* and *Blakely*, for by their own terms, they concern situations in which a defendant is exposed to a greater punishment than otherwise authorized by the jury's verdict. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely*, *supra*, 124 S.Ct. at p. 2536.) Here, Brooks was exposed to terms of imprisonment of 15 years to life based upon the jury's findings regarding the one strike allegations. Section 667.61, subdivision (b) provides that "a person who is convicted of *an offense* specified in subdivision (c) under *one of the circumstances* specified in subdivision (e) *shall* be punished by imprisonment in the state prison for life." (Emphasis added.) Pursuant to

this language, the applicability of the one strike law depends on a determination that the defendant committed an enumerated offense under an enumerated circumstance. The jury made that determination: it found that Brooks had committed several violations of section 288, subdivision (a), which is an offense listed in subdivision (c), and that Brooks committed the offense against multiple victims, a circumstance listed in subdivision (e). (§ 667.61, subds. (c) & (e)(5).) These jury findings were sufficient to subject Brooks to the increased punishments of the one strike law.

Brooks observes that there is an exception to the one strike law for violators of section 288, subdivision (a) who are eligible for probation, and argues that the jury must therefore determine defendants' probation eligibility. We disagree because the probation eligibility exception is a sentence mitigator, not a sentence aggravator. Under the one strike law, a defendant convicted of a violation of section 288, subdivision (a) against more than one victim is to be sentenced to a term of 15 years to life. (§ 667.61, subds. (b)-(e).) Subdivision (c)(7) of section 667.61 establishes an exception to that sentencing rule for a defendant who is eligible for probation under section 1203.66, subdivision (c). A finding that a defendant is eligible for probation, therefore, does not increase the penalty authorized by the jury's verdict. Rather, a finding of probation eligibility does just the opposite—it mitigates the possible punishment. Because a determination of Brooks's eligibility for probation is not a fact that would increase his sentence beyond that authorized by the jury's verdict, *Apprendi* and *Blakely* do not require the jury to determine his probation eligibility. We find no error.

Even if we were to hold that the question of Brooks's probation eligibility should have been determined by the jury, under these circumstances any error would nonetheless have been harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error evaluated under harmless error test of *Chapman v. California* (1967) 386 U.S. 18].) The 1203.066 probation eligibility provisions are extremely limited provisions designed to permit probation for certain nonviolent intrafamily child molesters in response to legislative concerns that child victims would

suffer guilt if a nonviolent molester who had been a parental figure for the child was imprisoned and that the imprisonment of such an individual would cause further hardship for the family because of the loss of the molester's financial support. (*People v. Jeffers* (1987) 43 Cal.3d 984, 995, 997.) Accordingly, the Legislature gave the court discretion to order probation if a defendant establishes that (1) he or she is the victim's "natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household"; (2) a grant of probation to the defendant is in the child victim's best interest; (3) rehabilitation of the defendant is feasible, the defendant is amenable to treatment, and the defendant is placed in an appropriate treatment program for molesters; (4) the defendant is removed from the household of the victim until the court determines that the best interests of the child would be served by the defendant's return to the home; and (5) there is no threat of physical harm to the child victim if probation is granted. (§ 1203.066, subd. (c)(1)-(5); *People v. Groomes* (1993) 14 Cal.App.4th 84, 89.)

Here, contrary to Brooks's assertion that this was not explored at trial, there was abundant evidence that Brooks did not meet the first element of the probation eligibility test. He was not a relative of the children and he did not live in their home. The boys' mother testified that Brooks was the children's godfather and that during the period in question she had brought the children to Brooks's house; she and the children lived elsewhere. Y.P. testified that Brooks was a "relative, I think," but clarified that he called Brooks a relative "because I know him" and that Brooks was his godfather and a friend of his mother. Y.P. also testified that the molestations took place at Brooks's house and that he and his brother were brought to Brooks's house by their mother. Brooks told the police that when he was with the boys, they and their mother were visiting and were not living with him. At the time of trial, the children lived with their aunt, not with Brooks, and there was no evidence that they had ever shared a home with Brooks. Under these circumstances, even if Brooks's probation eligibility was submitted to a jury, no reasonable jury could have concluded that Brooks was a "natural parent, adoptive parent,

stepparent, relative, or . . . a member of the victim's household who has lived in the victim's household." (§ 1203.066, subd. (c)(1).) Any error would therefore have been harmless beyond a reasonable doubt.

III. Sentencing and Abstract of Judgment Issues

The trial court made several sentencing errors that require a remand for resentencing. First, when the court imposed the sentences of 15 years to life for the lewd act convictions under the one strike law, it stated that it was required by the one strike law to impose the sentence on count 4 consecutively to the sentence on count 1 because the counts involved different victims. Although section 667.61, subdivision (g) requires the court to impose a one strike sentence for each separate victim on a single occasion, the statute does not require that the sentences be served consecutively. (§ 667.61, subd. (g); *People v. Murphy* (1998) 65 Cal.App.4th 35, 38-43.) Accordingly, we remand for the court to exercise its informed discretion in determining whether the sentence on count 4 should be served concurrently or consecutively to the sentence on count 1.

Second, the court imposed a one strike sentence of 15 years to life on count 5. The court, however, had previously dismissed the multiple victim one strike allegation as to count 5. As the Attorney General concedes, because the one strike allegation had been dismissed as to this count, it was error to sentence Brooks pursuant to the one strike law on that count, and the matter must be remanded to permit resentencing on this count without reference to the one strike law.

Third, although Brooks was acquitted on count 6, according to the reporter's transcript the trial court imposed a sentence of 15 years to life on that count. This sentence is not reflected on the abstract of judgment, but appears to have been orally pronounced. On remand to address the other sentencing errors, the trial court may clarify that no sentence was imposed upon this count.

Fourth, Brooks's abstract of judgment lists a sentence of life without the possibility of parole, although there is no indication of the count to which this purported sentence pertains. As no counts are associated with this sentence, it appears that this was a typographical error. On remand to correct the other sentencing errors, this error in the abstract of judgment should be corrected.

IV. Cruel and Unusual Punishment

Brooks contends that his sentence of 30 years to life on counts 1 and 4 is cruel and unusual under the state and federal constitutions. As discussed above, the matter must be remanded for resentencing because the court was under the erroneous impression that the second 15-years-to-life sentence was required by law to be imposed consecutively to the first. As Brooks's sentence is subject to alteration at resentencing, the question of whether that sentence would constitute cruel and unusual punishment is not properly before this court at this time.

DISPOSITION

The matter is remanded to the trial court for resentencing. The clerk of the superior court is then directed to prepare a corrected abstract of judgment and to forward a certified copy of the abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.